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BEFORE THE DEPARTMENT
OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF APPLICATION FOR
CHANGE OF APPROPRIATION WATER
RIGHT NO. 16,322-c411 BY ROBERT
McTAGGART

FINAL ORDER

The Proposed Findings of Fact, Conclusions of Law and Order as entered by the Hearing Examiner on January 31, 1980, are hereby adopted as the Findings of Fact, Conclusions of Law and Final Order.

Comments on the Proposal for Decision were received from Objector, Jack B. Gehring prior to the February 15, 1980, deadline set by the Hearing Examiner. Mr. Gehring presented seven (7) reasons why Application No. 16,322-c411 should be denied. Listed below are Mr. Gehring's comments with the Hearing Examiner's response to each:

- 1.) Not a beneficial use - This comment was addressed in the Proposed Conclusions of Law, points three (3) and four (4).
- 2.) Much greater burden upon creek - This comment was addressed in the Proposed Findings of Fact, points five (5) and six (6).
- 3.) Water Commissioner - Mr. Gehring testified at the hearing that a water commissioner was appointed on Silver Creek in the years prior to 1979.
- 4.) Only 90 acres, not more - The Applicant is restricted to the use of water on 90 acres in point one (1) of both the Proposed Order and the Final Order.
- 5.) There is no ditch to sump - The Applicant has requested a change in place of use, not a change in point of diversion. The granting of this Authorization for Change by the Department is for a change in the place of use only.
- 6.) Drain ditch in swamp is evidenced by pictures on south side of Silver Creek - No additional evidence may be submitted following the

1 closure of the hearing, thus these photographs may not be considered
2 as evidence in this matter.

3 7.) Not all water right users notified - Proper notice of this Application
4 was given in the Independent Record on April 12, 19, and 26, 1978.

5
6 FINAL ORDER

7 1. Subject to the conditions and limitations imposed below, Application
8 for Change of Appropriation Water Right No. 16,322-c41I by Robert McTaggart
9 is hereby granted to change a portion of the following water rights, as
10 decreed to William Brown in Case No. 4999: 30 miner's inches with a priority
11 date of June 1, 1865, and 75 miner's inches with a priority date of August 1,
12 1866; totaling approximately 105 miner's inches, from Silver Creek, a tributary
13 of Prickly Pear Creek, in Lewis and Clark County, Montana. The water has been
14 diverted from Silver Creek by means of a ditch at a point in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of
15 Section 1, Township 11 North, Range 5 West, M.P.M., and used for irrigation
16 purposes on a total of 60 acres, more or less, located in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ SW $\frac{1}{4}$ of
17 Section 6, and the N $\frac{1}{2}$ of Section 7, Township 11 North, Range 4 West, M.P.M.,
18 from April 15 to October 15, inclusive, of each year.

19 The proposed change is to use 600 gallons per minute of water not to
20 exceed 171 acre-feet per annum for irrigation purposes on a total of 90 acres,
21 more or less, located in the S $\frac{1}{2}$ NW $\frac{1}{4}$ of Section 6, Township 11 North, Range 4
22 West, M.P.M., and used from April 15 to October 15, inclusive, of each year and
23 for stock watering purposes from January 1 to December 31, inclusive, of each
24 year. The proposed change is to change the place of use and for no other reason.

25 2. The Applicant shall install and maintain an adequate flow measuring
26 device in order to allow the flow rate and volume of water diverted to be
27 recorded. The Applicant shall keep a written record of the flow rate and
28 volume of all waters diverted, including the period of time, and shall submit
29 such records to the Department upon request.

30 3. The granting of Authorization to Change Appropriation Water Right
31 No. 16,322-c41I by the Department in no way reduces or alters the Applicant's
32 liability for damage caused by the Applicant's exercise of said Authorization.

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to Change nor does the Department in issuing this Authorization in any way
acknowledge liability for damage caused by the Applicant's exercise of this
Authorization.

4. The granting of the Authorization to Change Appropriation Water
Right in no way grants the Applicant any right to violate the rights of any
other party, nor does it excuse the Applicant from any liability for same,
even if such violation is a necessary and unavoidable consequence of exercising
this Authorization.

NOTICE

The Hearing Examiner's Final Order may be appealed in accordance with
the Montana Administrative Procedures Act by filing a petition in the appropriate
court within thirty (30) days after service of the Final Order.

No water may be diverted under this Final Order until the Authorization
for Change is received by the Applicant.

DATED this 27th day of February, 1980.

David L. Pengelly
DAVID L. PENGELLY, D. N. R. & C.
HEARING EXAMINER

1 Montana Department of Natural Resources and Conservation personnel
2 present and testifying on behalf of the Department were Larry Brown,
3 Hydrologist; Glenn Smith, Soil Scientist; Greg Van Voast, Water Rights
4 Analyst, Helena Office; and Arlin Krogstad, Hearing Representative. Also
5 present was Vicki Woodrow, Hearing Recorder. The Department was not
6 represented by legal counsel. Three (3) exhibits were introduced by
7 the Department, to wit:

8 DEPARTMENT'S EXHIBITS:

- 9 D-1 Copy of aerial photo of Applicant's point of diversion,
10 irrigated fields, ditches and proposed place of use.
11 D-2 Copy of aerial photo of Objector's property
12 D-3 Copy of aerial photo of William Brown's 160 acres at time
13 of 1903 Silver Creek Decree
14

15 The Department's Exhibits were marked accordingly and received into the
16 record without objection.

17 For the purpose of this Proposal for Decision, the following termin-
18 ology is hereby adopted:

- 19 1. Case No. 4999; May 22, 1903, 1903; In the District Court of the
20 First Judicial District of Montana, In and for the County of
21 Lewis and Clark, is to be referenced as "the 1903 decree".
22 2. Case No. 4999; January 24, 1967, In the District Court of the
23 First Judicial District of Montana, In and for the County of
24 Lewis and Clark, is to be referenced as "the 1967 decree".

25 "The 1903 decree" was by reference made a part of the findings of
26 fact, conclusions of law, instructions and orders to the water commissioner
27 of "the 1967 decree".

28 Both "the 1903 decree" and "the 1967 decree" are part of the file

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1 on this matter.

2
3 SUMMARY OF RECORD

4 1. On December 7, 1977, the Department received an Application for
5 Change of Appropriation Water Right No. 16,322-c41I by Robert McTaggart
6 to change a portion of the following water rights, as decreed to William
7 Brown in Case No. 4999: a water right of 30 miner's inches with a
8 priority date of June 1, 1865 and a water right for 75 miner's inches with
9 a priority date of August 1, 1866; totaling approximately 105 miner's
10 inches from Silver Creek, a tributary of Prickly Pear Creek, in Lewis and
11 Clark County, Montana. The water has been diverted from Silver Creek
12 by means of a ditch at a point in the SE1/4 SE1/4 SE1/4 of Section 1,
13 Township 11 North, Range 5 West, M.P.M., and used for irrigation purposes
14 on a total of 67 acres, more or less, located in the SW1/4 SW1/4 SW1/4
15 of Section 6, and N1/2 of Section 7, Township 11 North, Range 4 West,
16 M.P.M., from April 15 to October 15, inclusive, of each year; and for
17 stock watering purposes from January 1 to December 31, inclusive, of
18 each year.

19 The proposed change is to use the water for supplemental irrigation
20 purposes on a total of 110 acres, more or less, located in the S1/2
21 NW1/4 of Section 6, Township 11 North, Range 4 West, M.P.M., and used
22 from April 15 to October 15, inclusive, of each year; and for stock
23 watering purposes from January 1 to December 31, inclusive of each
24 year. The proposed change is to change the place of use and for no
25 other reason.

26 2. On April 12, 19 and 26, 1978, the Department caused to be duly
27 published in the Independent Record, Helena, Montana, notice of the above
28 Application for Change of Appropriation Water Right No. 16,322-c41I

3. On April 10, 1978, the Department received an objection to the

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1 above Application from Jay Lyndes.

2 4. On April 11, 1978, the Department received an objection to the
3 above Application from Angus Brown.

4 5. On May 11, 1978, the Department received an objection to the
5 above Application from Melinda Kelly.

6 6. On May 30, 1978, the Department received an objection to the
7 above Application from Jack B. Gehring.

8 7. In a letter from counsel dated June 4, 1978, Jay Lyndes,
9 Angus Brown and Melinda Kelly withdrew their objections to the above
10 Application contingent upon the withdrawal of pending Application No.
11 15,252-s41I by the Applicant, Robert McTaggart.

12 8. At the Pre-hearing Conference held on April 17, 1978, Application
13 for Change of Appropriation Water Right No. 16,322-c41I was revised.
14 The number of currently irrigated acres was reduced from 67 to 60. The
15 amount of water used was reduced from 105 miner's inches (1178 gallons
16 per minute) to 600 gallons per minute, and a maximum diversion of 171 acre-
17 feet per annum was added. This volume is the water requirement for 60
18 acres but will be applied to 90 acres. The Applicant has pending
19 Application for Beneficial Water Use No. 15,251-s41I which he intends
20 to use to supply the water requirement for the remaining 30 acres.

21 9. The Applicant, Robert McTaggart, testified that the Authorization
22 for Change he has applied for is a change in the place of use and nothing
23 else. He feels that the Authorization should be granted because it would
24 be a more beneficial use of a smaller amount of water than his decreed
25 rights allow. The Applicant would use the water to raise alfalfa hay to
26 feed to his horses and cattle. He further testified that approximately
27 1/3 of his decreed ground is currently swampy, with soils that do not
28 require much irrigation. At one time, however, this land was not swamp
and was irrigated, according to Mr. McTaggart.

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1 10. The Objector, Jack Gehring, testified that the waters of Silver
2 Creek were decreed in "the 1903 decree" and the decree was reinforced in
3 "the 1967 decree". Mr. Gehring feels that any changes from this decree
4 will injure users with decreed rights on Silver Creek. He further testified
5 that all lands owned by the Applicant, and mentioned in "the 1903 decree"
6 were adjacent to the creek; any excess water applied to these lands would
7 percolate back into the stream and be available to downstream appropriators.
8 Mr. Gehring also testified that the Applicant could only irrigate
9 approximately 20 acres south of the creek; the 60 acres the Applicant claims
10 to have irrigated south of the creek were not historically irrigated. The
11 Objector further testified that his land is downstream from the Applicant's
12 land; he irrigates over 200 acres with Silver Creek and Three Mile Creek
13 water, and there was insufficient water to irrigate his hay fields during
14 the summer of 1979. Mr. Gehring also testified that there has been a
15 water commissioner on Silver Creek in the years prior to the summer of 1979.
16 Mr. Gehring stated his belief that the use of water to grow hay to feed
17 to race horses is not a beneficial use.

18 11. Mr. Glenn Smith, Department Soil Scientist, answered question
19 regarding his report that is part of the file in this matter. Mr. Smith
20 stated that a sprinkler irrigation system will divert less water than a
21 flood irrigation system, but has a lower return flow due to its higher
22 efficiency. He further stated that you could ordinarily transfer water
23 acre for acre from a flood system to a sprinkler system and still not
24 consumptively use as much water under a sprinkler system. Mr. Smith also
25 pointed out that the consumptive use of a crop is a constant value
26 independent of soil type.

27 12. Arlin Krogstad, Department Hearing Representative, testified
28 that the Applicant's irrigable acreage was determined with a planimeter

1 from aerial photos. Those fields which could have been flood irrigated by
2 ditches present on the Applicant's property were considered to have been
3 historically irrigated. Mr. Krogstad assumed that the ditches had been
4 originally dug for irrigation purposes. Mr. Krogstad further stated
5 that an acre for acre transfer from flood irrigation to sprinkler irrigation
6 would not adversely affect the rights of prior appropriators.

7 13. "The 1967 decree", Section XV, pages 6 and 7, state, ". . . all
8 of the lands involved in this action are arid in character and require
9 artificial irrigation in order to raise crops thereon; that at all times
10 during the irrigating season of each and every year all of the waters of
11 Silver Creek and its tributaries are needed and required by all the
12 water users having appropriations and water rights in Silver Creek and
13 its tributaries for use upon their respective lands for irrigating the same
14 for the purpose of raising crops and for domestic and other useful purposes.

15
16 PROPOSED FINDINGS OF FACT

- 17 1. That entries 1 - 8 of the Summary of Record are hereby adopted
18 as uncontroverted facts.
- 19 2. That the Applicant has two (2) decreed water rights from Silver
20 Creek totaling 105 miner's inches (1178 gallons per minute).
- 21 3. That 60 acres of the Applicant's land were under actual or
22 contemplated irrigation at the time of "the 1903 decree" on Silver Creek.
- 23 4. That at one time these lands were arid in character and were
24 irrigated.
- 25 5. That an acre for acre transfer in place of use from a flood
26 irrigation system to a sprinkler irrigation system will not adversely
27 affect the rights of other persons on Silver Creek.
- 28

1 to change Appropriation Water Right No. 16,322-c41I by Robert McTaggart
2 is hereby granted to change a portion of the following water rights, as
3 decreed to William Brown in Case No. 4999: 30 miner's inches with a
4 priority date of June 1, 1865, and 75 miner's inches with a priority
5 date of August 1, 1866; totaling approximately 105 miner's inches, from
6 Silver Creek, a tributary of Prickly Pear Creek, in Lewis and Clark County,
7 Montana. The water has been diverted from Silver Creek by means of a
8 ditch at a point in the SE1/4 SE1/4 SE1/4 of Section 1, Township 11 North,
9 Range 5 West, M.P.M., and used for irrigation purposes on a total of 60
10 acres, more or less, located in the SW1/4 SW1/4 SW1/4 of Section 6, and
11 the N1/2 of Section 7, Township 11 North, Range 4 West, M.P.M., from April
12 15 to October 15, inclusive, of each year, for stock watering purposes
13 from January 1 to December 31, inclusive, of each year.

14 The proposed change is to use 600 gallons per minute of water not
15 to exceed 171 acre-feet per annum for irrigation purposes on a total
16 of 90 acres, more or less, located in the S1/2 NW1/4 of Section 6,
17 Township 11 North, Range 4 West, M.P.M., and used from April 15 to
18 October 15, inclusive, of each year and for stock watering purposes from
19 January 1 to December 31, inclusive, of each year. The proposed change
20 is to change the place of use and for no other reason.

21 2. The Applicant shall install and maintain an adequate flow
22 measuring device in order to allow the flow rate and volume of water diverted
23 to be recorded. The Applicant shall keep a written record of the flow rate
24 and volume of all waters diverted, including the period of time, and shall
25 submit such records to the Department upon request.

26 3. The granting of Authorization to Change Appropriation Water Right
27 No. 16,322-c41I by the Department in no way reduces or alters the Applicant's
28 liability for damage caused by the Applicant's exercise of said Authorization

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1 to Change nor does the Department in issuing this Authorization in any
2 way acknowledge liability for damage caused by the Applicant's exercise
3 of this Authorization.

4 4. The granting of the Authorization to Change Appropriation Water
5 Right in no way grants the Applicant any right to violate the rights of
6 any other party, nor does it excuse the Applicant from any liability for
7 same, even if such violation is a necessary and unavoidable consequence
8 of exercising this Authorization.

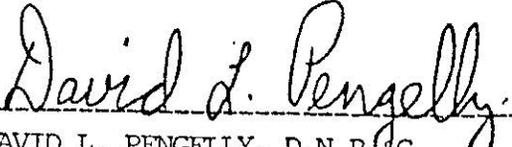
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10 NOTICE

11 This Proposed Order is offered for the review and comment of all
12 parties of record. The review and comment period shall commence with
13 the mailing of this Proposed Order and shall end fifteen (15) days
14 thereafter. No extensions of time for comment will be granted.

15 The Final Order in this matter will be sent to all parties by
16 certified mail.

17 The Hearing Examiner's Final Order may be appealed in accordance
18 with the Montana Administrative Procedures Act by filing a petition
19 in the appropriate court within thirty (30) days after service of the
20 Final Order.

21
22 DATED this 31st day of January, 1980.

23
24 
25 _____
26 DAVID L. PENGELLY, D.N.R.C.
27 HEARING EXAMINER